STATE OF MICHIGAN

COURT OF APPEALS

JASON BAKER,

Plaintiff-Appellee,

v

MICHAEL COUCHMAN,

Defendant-Appellant,

and

PINCKNEY COMMUNITY SCHOOLS,

Defendant.

FOR PUBLICATION
May 30, 2006
9:00 a.m.

No. 264914
Livingston Circuit Court
LC No. 04-020847-CD

Official Reported Version

Before: Smolenski, P.J., Whitbeck, C.J., and O'Connell, J.

SMOLENSKI, P.J.

Defendant Michael Couchman appeals as of right from the trial court order denying his motion for summary disposition of plaintiff's tortious interference with a business relationship claim under MCR 2.116(C)(7).[1] We affirm.

I. Facts and Procedural History

Plaintiff Jason Baker has been a deputy with the Livingston County Sheriff's Department (LCSD) since June 1997. In November 2001, plaintiff was assigned to be the school resource officer (SRO) for Pinckney Community Schools. Initially, plaintiff claims to have had a good working relationship with school officials, including defendant, who is the superintendent. However, beginning in the summer of 2002, plaintiff claims that his relationship with defendant deteriorated. As a result of the breakdown in the working relationship between defendant and

[1] Defendant Pinckney Community Schools is not a party to this appeal. We shall use "defendant" to refer solely to defendant Michael Couchman.

plaintiff, in April 2004, plaintiff was reassigned from his position as SRO for Pinckney Community Schools to road patrol.

In July 2004, plaintiff commenced the present lawsuit. In his first count, plaintiff alleged that defendant and Pinckney Community Schools violated the Whistleblowers' Protection Act (WPA)[2] by causing him to be reassigned to road patrol in retaliation for engaging in protected activities. In his second count, plaintiff alleged that defendant "intentionally, maliciously and improperly interfered with and disrupted" his employment relationship with the LCSD by interfering with his investigations, threatening him with removal, and improperly influencing LCSD to remove him from the position of SRO.

On July 22, 2005, defendants moved for summary disposition under MCR 2.116(C)(7), (8), and (10). At a hearing held on August 18, 2005, the trial court determined that defendants did not employ plaintiff and, hence, were not subject to liability under the WPA.[3] However, the trial court determined that defendant was not entitled to governmental immunity from plaintiff's claim for tortious interference with a business relationship. For these reasons, on the same day as the hearing, the trial court entered an order granting defendants' motion with respect to plaintiff's WPA claim, but denying it with respect to plaintiff's claim of tortious interference with a business relationship.[4] Defendant then appealed as of right the trial court's determination that he was not entitled to governmental immunity. See MCR 7.202(6)(a)(v) and 7.203(A)(1).

II. Immunity

Defendant argues that he is entitled to absolute governmental immunity from suit under MCL 691.1407(5). Therefore, he further contends, the trial court should have dismissed under MCR 2.116(C)(7) plaintiff's claim of tortious interference with a business relationship. We disagree.

This Court reviews de novo the grant or denial of a motion for summary disposition to determine whether the moving party is entitled to judgment as a matter of law. *Michigan Citizens for Water Conservation v Nestlé Waters North America Inc*, 269 Mich App 25, 98; 709 NW2d 174 (2005). Likewise, the applicability of governmental immunity is a question of law reviewed de novo. *Herman v Detroit*, 261 Mich App 141, 143; 680 NW2d 71 (2004). Summary disposition under MCR 2.116(C)(7) is appropriate if the claim is barred by immunity granted by law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). "A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence." *Id.* at 119. Furthermore, the "contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Id.*

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[2] See MCL 15.361 *et seq*.

[3] See MCL 15.362.

[4] Plaintiff has not appealed the dismissal of his WPA claim.

Pursuant to MCL 691.1407(5), "[a] judge, a legislator, and the elective or highest appointive executive official of all levels of government are immune from tort liability for injuries to persons or damages to property if he or she is acting within the scope of his or her judicial, legislative, or executive authority." There is no intent exception to the immunity provided by MCL 691.1407(5). *American Transmissions, Inc v Attorney General*, 454 Mich 135, 143-144; 560 NW2d 50 (1997). Instead, the relevant inquiry is always whether the official acted within the scope of his or her authority. *Id.* at 144. The superintendent of a school district is the highest appointive executive official of a level of government. *Nalepa v Plymouth-Canton Community School Dist*, 207 Mich App 580, 589; 525 NW2d 897 (1994), result only aff'd 450 Mich 934 (1995).[5] Therefore, defendant is entitled to immunity from tort liability as long as the acts, which purportedly amount to tortious interference with a business relationship, fell within the scope of defendant's executive authority. MCL 691.1407(5).

> "The determination whether particular acts are within their authority depends on a number of factors, including the nature of the specific acts alleged, the position held by the official alleged to have performed the acts, the charter, ordinances, or other local law defining the official's authority, and the structure and allocation of powers in the particular level of government." [*Amercian Transmissions*, *supra* at 141, quoting *Marrocco v Randlett*, 431 Mich 700, 711; 433 NW2d 68 (1988).]

In his complaint, plaintiff alleged that defendant engaged in a series of acts of misconduct with the intention to interfere with plaintiff's employment relationship with the LCSD. At his deposition, plaintiff indicated that his relationship with defendant began to deteriorate after he conducted an investigation that led him to conclude that the school district had a problem with employee theft. Plaintiff said that defendant told him that defendant was appalled at the accusation and attempted to direct plaintiff's attention toward a specific individual. Plaintiff eventually turned the investigation over to the detective bureau to avoid conflict with defendant and other school officials.

After this incident, plaintiff stated that school officials became very uncooperative, and defendant began to directly interfere with his attempts to investigate potential crimes. Plaintiff testified at his deposition concerning three particular incidents. In the first incident, plaintiff was investigating a complaint by a student that another student stole clothing from his locker.

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[5] We disagree with plaintiff's contention that *Giddings v Detroit*, 178 Mich App 749; 444 NW2d 242 (1989), and *Kirschner v Carney-Nadeau Pub Schools*, 174 Mich App 642; 436 NW2d 416 (1989), are properly applicable to this case. In *Nalepa*, the Court recognized that these cases had held that superintendents were not entitled to absolute immunity. *Nalepa, supra* at 589-590. However, the Court in *Nalepa* determined that those cases construed the law as it existed before the enactment of 1986 PA 175. For that reason, the Court in *Nalepa* declined to follow them. Instead, it determined that under the plain meaning of MCL 691.1407(5), superintendents were entitled to absolute immunity. *Nalepa, supra* at 590. Consequently, *Nalepa* is the relevant controlling authority.

Plaintiff stated that, while he was investigating the complaint, defendant told him to cease investigating the alleged theft and told him not to have contact with the student identified by the victim as the perpetrator.

In another incident, plaintiff was investigating an alleged threat involving a knife. Plaintiff stated that the parents of the student who allegedly made the threat contacted defendant, who then demanded a meeting with plaintiff. At the meeting, plaintiff claims that defendant tried to convince plaintiff to cease investigating the crime because the student was part of a good family that had been very supportive of the school district. Plaintiff further stated that he was concerned when he received the knife purportedly used in the altercation through defendant's office. Plaintiff said that he should have been permitted to get the knife directly from the student in order to preserve the chain of custody.

The incident that led to the complete breakdown in the relationship between plaintiff and defendant began, according to plaintiff, with plaintiff's investigation of a reckless driving incident that resulted in damage to a student's car. Plaintiff stated that he investigated the incident and then told the parents of the student who caused the damage that they should work out a solution with the victim's parents or he might have to turn the matter over to the prosecutor's office. After this discussion, plaintiff said he attempted to collect the student's vehicle registration and insurance papers, but the student told him that his parents were meeting with defendant and that plaintiff would get the papers later. Plaintiff stated that defendant apparently drove the parents to the sheriff's department to file a complaint against plaintiff for threatening their son, but the complaint was found to be without merit. Plaintiff further claimed that, when he again tried to obtain the papers for the student's vehicle, the student informed him that the assistant principal had them. Plaintiff said he then attempted to get the papers from the assistant principal, but she refused to hand them over. She told plaintiff that defendant had instructed her not to give the papers to him and had also instructed her to tell plaintiff that he was not to have further contact with the student. Plaintiff proceeded to turn the matter over to his superior officer, who was also denied access to the papers, purportedly at the behest of defendant. Thereafter, plaintiff's superiors issued a warrant request against defendant for obstruction of justice and witness tampering, which request was later withdrawn. After the final incident, the prosecutor's office suggested mediation, which was unsuccessful. Thereafter, plaintiff was removed from the SRO position.

In addition to these incidents of interference, plaintiff alleges that defendant engaged in a concerted effort to remove him from his position as SRO. Plaintiff claims that defendant circulated a pamphlet to the school board denouncing plaintiff, solicited the aid of parents to petition for plaintiff's removal and file complaints against him, and directly contacted his superiors at LCSD in an attempt to obtain plaintiff's removal as SRO.

After careful consideration of the alleged misconduct, we conclude that some, but not all, of the described conduct falls within the scope of defendant's executive authority. As the highest executive authority of the school district, defendant clearly has broad authority over the day-to-day operations of the school district, which necessarily involves supervising faculty, staff, and other persons operating within the school district and monitoring their interactions with the students. Hence, we hold that it was within the scope of defendant's executive authority to

closely supervise plaintiff's activities as SRO. It was also within the scope of defendant's authority to express his concerns to plaintiff's superiors, to the school board, and to the public in general and even to petition these groups for plaintiff's removal as SRO. Additionally, it was within the scope of defendant's authority to create appropriate boundaries on the nature and extent of plaintiff's proactive law enforcement activities while acting as SRO.

However, we cannot conclude that it was within the scope of defendant's authority to actively interfere with plaintiff's criminal investigations. Indeed, it was decidedly *outside* the scope of his executive authority as superintendent of a school district to prevent plaintiff, a county law enforcement officer, from contacting witnesses, to direct witnesses not to cooperate with a police investigation, to interfere with the collection of evidence, to arguably withhold evidence, to actively facilitate the filing of third-party complaints against plaintiff (that is, by chauffeuring a student's parents to the sheriff's department), and to attempt to influence a law enforcement officer to refrain from investigating or reporting possible criminal behavior.[6] We acknowledge that it is within the scope of defendant's authority to oversee the discipline and safety of students in his district; however, we find it significant that in exercising that authority, defendant agreed to a partnership with the LCSD to allow law enforcement personnel onto school grounds with the express duty of "[i]nvestigat[ing] criminal complaints on school property." While investigation of misconduct on school grounds is foremost within the province of the school administration, once the administration opens the schoolhouse doors to assistance from law enforcement personnel, it concedes some of its authority to that autonomous agency. That is, while the administration would be expected to remain involved to the extent it was necessary to advocate for its students' best interests, the administration loses its authority to direct or interfere with law enforcement personnel's function of investigating conduct violative of the laws of this state. We reiterate and stress that, to the extent defendant was dissatisfied with or critical of plaintiff's investigative methods, it would be within the province of defendant's authority to express those concerns to the appropriate parties. But, notably, we see no indication in the record that plaintiff was engaged in any misconduct in his pursuit to investigate criminal activity. Hence, MCL 691.1407(5) does not immunize defendant from tort liability for injuries arising from these acts of interference.

We also reject defendant's contention that, even if he is not entitled to absolute immunity under MCL 691.1407(5), he is entitled to qualified immunity under MCL 691.1407(2). Under MCL 691.1407(2), "each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, council, commission, or statutorily created task force of a governmental agency is immune from tort liability" if each of three conditions is met. One of the three conditions is that the "officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her

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[6] We similarly reject defendant's contention that the prosecutor's failure to charge defendant with a crime indicates that these acts were lawful. Prosecutors may decline to pursue criminal charges for a variety of reasons, and we decline to speculate concerning the meaning behind the fact that no charges were pursued in this matter.

authority." MCL 691.1407(2)(a). As already noted, defendant's actions interfering with a criminal investigation clearly fell outside the scope of his authority. Further, we hold that no person in defendant's position would reasonably believe that such conduct was within the scope of his or her authority. Therefore, defendant would not be entitled to immunity under MCL 691.1407(2).

III. Conclusion

Although defendant is entitled to governmental immunity to the extent that plaintiff's claim is premised on conduct we have determined to be within the scope of defendant's executive authority, to the extent that plaintiff's claim is based on defendant's interference with plaintiff's criminal investigations, it is not barred by governmental immunity. Because a jury could conclude that these acts were either wrongful per se or,[7] if lawful, done with malice and unjustified in the law for the purpose of invading plaintiff's contractual rights or a business relationship, see *Badiee v Brighton Area Schools*, 265 Mich App 343, 367; 695 NW2d 521 (2005), and could conclude that these acts were the ultimate cause of plaintiff's transfer, defendant was not entitled to summary disposition of plaintiff's tortious interference claim on the basis of governmental immunity.

IV. Response to the Dissent

Because we believe our esteemed colleague has misconstrued the record evidence and misunderstood the limited nature of our holding, we feel compelled to respond to some of the issues addressed in the dissent.

First, we note that we are somewhat troubled by our dissenting colleague's characterization of the record evidence. We must clarify that this case is not about the authority of a superintendent to control the actions of a security guard hired by the school district. Defendant is a full-fledged deputy of the Livingston County Sheriff's Department. In addition, although a jury might decide that plaintiff was transferred because he was "overzealous" and "overbearing", *post* at ___, ___, the evidence also supports the conclusion that plaintiff was a responsible police officer who was simply the subject of abuse at the hands of a superintendent who personally disliked him.[8] In any event, the relevant inquiry is whether defendant's conduct is entitled to governmental immunity. Consequently, whether plaintiff was "overzealous" or "overbearing" is irrelevant. Furthermore, although the dissent characterizes the incidents at issue

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[7] "A 'per se wrongful act' is an act that is inherently wrongful or one that is never justified under any circumstances." *Formall v Community Nat'l Bank of Pontiac*, 166 Mich App 772, 780; 421 NW2d 289 (1988).

[8] We note that the dissent neglects to mention that for each of the relevant incidents, plaintiff was asked to initiate an investigation either by the victim or another authorized person. The dissent further neglects to mention that the record contains evidence that plaintiff's superiors actually instructed him to speak to the media about several incidents and that when the superintendent asked plaintiff to refrain from further media interviews, he complied.

as "trivial" and "minor," *post* at ___, ___, we sincerely doubt that the student-victim who asked defendant for assistance in recovering his stolen property or the parents of the student who was threatened with a knife would consider such incidents to be trivial or minor in nature. Criminal activity on our public school campuses must be taken just as seriously, if not more seriously, than crimes committed off-campus.

Second, we believe the dissent has misstated the extent of our holding. As noted above, we recognize that superintendents have broad authority to supervise the affairs of their school districts. This authority includes the right to delineate appropriate boundaries for *proactive* law enforcement on public school campuses. Hence, it was within defendant's authority to tell plaintiff not to conduct sting operations on campus or to enlist the aid of students in conducting law enforcement activities. Likewise, it was clearly within defendant's authority to contact plaintiff's supervisors and to petition for plaintiff's removal as SRO. However, once a complainant has filed a complaint with a duly authorized police officer and that officer has begun a formal investigation, even when that officer is an SRO, the superintendent's ability to interfere with that investigation is necessarily limited. To hold otherwise is to invite school administrators to interfere with the criminal investigations of officers assigned to cases involving students or school personnel whenever the administrators feel that the investigation might reflect poorly on the school district. Such a holding would place police officers in the untenable position of having to decide between upholding the law and acquiescing to the whims of administrators who would rather avoid bad publicity.

We further disagree that our determination that it is not within the scope of a superintendent's executive authority to interfere with an active police investigation will interfere with the day-to-day operations of the school district. Because our holding is limited to interference with *active* police investigations, it will not affect a principal or superintendent's ability "to break up a fistfight or detect and punish the theft of a yo-yo." *Post* at ___. Nor will it compel school officials to resort to calling the police every time an incident occurs. Instead, our narrow holding preserves the right of a superintendent to make administrative decisions regarding the activities of an SRO within his or her school district without needlessly broadening the superintendent's authority to encompass decisions properly left to prosecutors and law enforcement personnel.

We believe that the dissent's proposed holding would create additional uncertainty and tension between school officials and the police officers assigned to investigate crimes involving students and school personnel. The dissent would grant superintendents the authority to interfere with an active criminal investigation by a police officer assigned to the school district until the investigation is officially sanctioned by the sheriff, the prosecutor's office, or a judge. Hence, the dissent appears to recognize that it would be beyond the scope of a superintendent's executive authority to directly interfere with the activities of prosecutors, judges, and sheriffs. However, because we believe that even police officers who are assigned to a school district must be permitted to perform criminal investigations without fear of retaliation or interference by school officials, we must disagree with the dissent's analysis and conclusion.

We also disagree with the dissent's attempt to characterize plaintiff's employment situation as one involving dual employers.[9] As we noted, plaintiff is employed by the LCSD as a deputy. Furthermore, although we concluded that it was within the scope of defendant's authority as superintendent to supervise and place some limits on plaintiff's activities as SRO, at no point did we conclude that this authority was based on plaintiff's status as an employee of the school district. Indeed, we premised this authority on defendant's broad authority over the day-to-day operations of the school district, which necessarily involves supervising faculty, staff, and *other persons operating within the school district*.[10] See p ___ of this opinion. Hence, we concluded that the superintendent would have such authority even over third parties not employed by the school district, but nevertheless operating within the school district. Needless to say, the authority to supervise third parties operating within the school district does not transform these individuals into employees of the school district.[11]

Finally, we must also respectfully disagree with the dissent's conclusion that the conduct we have identified as falling outside defendant's executive authority does not amount to tortious interference with a business relationship. Plaintiff's tort claim is premised on the theory that defendant interfered with plaintiff's investigations in order to render his investigations ineffective and, thereby, influence plaintiff's superiors to remove plaintiff from his position as SRO. Viewing the record evidence in the light most favorable to plaintiff, as we must, *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999), we conclude that there is a factual question on that issue. The incidents described above are evidence of the extreme lengths to which defendant would resort in order to stifle any investigation involving plaintiff. A jury could infer from these incidents that the sheriff's office was left with no choice but to remove plaintiff from his position in order to placate defendant and avoid the kind of escalation evidenced by the sheriff's request for a warrant for defendant's arrest. Therefore, while we might personally come to a different conclusion, a reasonable jury could conclude that plaintiff

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[9] We note that defendant does not contend that plaintiff was an employee of the school district. Indeed, in his brief on appeal, defendant actually argued that plaintiff did not have an "employment or business relationship with [the] School District."

[10] Had plaintiff truly been an employee of the school district, as the dissent claims, defendant could have terminated plaintiff's employment directly. Yet even defendant recognized that he could not effect plaintiff's transfer or termination without the consent of plaintiff's supervisors at the LCSD.

[11] We sincerely doubt that the school district would embrace the dissent's expansive view of employment. Under the dissent's view, vendors, repairmen, contractors, college recruiters, and the innumerable other individuals who routinely perform services within the school district would be considered dual-employees simply because the superintendent has the authority to place limits on their activities and supervise their interactions with students. Such a holding would have far greater ramifications for the school district than our rather limited holding that it is outside the scope of a superintendent's authority to interfere with an active police investigation.

properly performed his duties as SRO and would not have been transferred were it not for the fact that defendant's interference rendered plaintiff ineffective.[12]

Affirmed.

/s/ Michael R. Smolenski

[12] We also disagree with the dissent's conclusion that plaintiff has not suffered a cognizable loss. Plaintiff presented evidence that his transfer to road patrol significantly decreased his earning potential with the LCSD. A reasonable jury could conclude that this loss of earning potential was the direct result of defendant's interference. Hence, there is a factual question about damages. Furthermore, the fact that the position from which he was transferred was created with the cooperation of the school district is irrelevant. Plaintiff had the right to pursue his assigned position without improper interference from third parties.